UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SEQUA CORPORATION, et al.

Plaintiffs,

- against - **91 Civ. 8675 (DAB)**

ORDER

JEFFREY GELMIN, et al.,

Defendants.

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DEBORAH A. BATTS, United States District Judge.

On November 2, 1999 the Court heard oral argument from Butler, Fitzgerald & Potter ("BFP") in support of their motion to intervene pursuant to Fed. R. Civ. P. 24(a) or (b). Plaintiffs and Defendants argued in opposition. On November 24, 1999 BFP submitted papers in support of their motion; Plaintiffs submitted opposition papers. Although Defendants opposed the intervention at oral argument they submitted no papers.

This order presumes a familiarity with the facts and parties involved in this extended litigation as addressed in this Court's previous orders and memoranda as well as the decision and remand of the Second Circuit. The law firm of BFP served as prior counsel to Defendants in this matter. In an ancillary proceeding in June 1995, Magistrate Judge Dolinger awarded BFP a charging lien of over $2.9 million against any future award for Defendants counterclaims in this action. Nearly four years later, BFP submitted a proposed amicus curiae brief concerning the issues on remand from the Second Circuit. However, in its discretion, this Court rejected the proposed brief finding that BFP's "position as prior counsel for Defendants places them so firmly upon the side of Defendants that they are almost by definition acting as an additional advocate." See Order of Aug. 27, 1999.

BFP's role as an additional advocate was confirmed when, during oral argument, the Court learned that BFP had been

providing legal and financial assistance to Defendants' counsel for some time. By BFP's own estimate, it has been assisting Defendants' counsel since "late 1998". Butler Aff. ¶ 4. Due to personal and strategic disagreements with Defendants' current counsel, BFP now moves to intervene as a party in its own right. See Tr. Nov. 2, 1999 at 18-19, 33, 35-36. BFP acknowledges that its interests are identical to Defendants. See Butler Aff. ¶ 10. However, BFP argues that it should be allowed to intervene due to Defendants' failure to "vigorously" litigate this action.

It is well settled that to intervene as of right the putative intervenor must 1) make a timely application, 2) have an interest in the property or transaction which is the subject of the action, 3) show that disposition of this action will impair or impede the applicant's ability to protect the interest, and 4) show that the interest in not adequately represented by the existing parties. Fed. R. Civ. P. 24(a)(2). The putative intervenor must satisfy all four parts of the test. Washington Electric Co. v. Massachusetts Municipal Wholesale Electric Co., 922 F.2d 92, 96 (2d Cir. 1990). BFP has failed to show that its application was timely and that its interests are not adequately represented. Further, it is far from clear that the financial interests of a party's former counsel is of the sort intended for protection under Federal Rule of Civil Procedure 24.

A. BFP's Asserted Interest

At the outset, movants have not demonstrated that they have an "interest" of the sort contemplated by Rule 24. Unlike proposed intervenors in the cases cited by BFP, here, movants have no interest in property within the Court's control, nor do they have a connection to the underlying transaction. Rather, BFP's sole interest is in receiving its legal fees for prior

representation, an interest already protected by its charging lien. BFP's interest, in essence, is in seeing Defendants prevail so that they can be paid.

The parties have pointed to no controlling case law, and this Court is aware of no controlling decision, in which former attorneys intervened as of right to serve as additional advocates for one party. In fact, in one case, cited by BFP, a three-judge panel commented that permitting a former attorney to intervene to protect his right to recover fees "may not represent the most persuasive use of [Federal Rule of Civil Procedure] 24." Keith v. St. George Packing Co., 806 F.2d 525, 526 (5th Cir. 1986). This Court agrees. The Court finds, therefore, that BFP has not met its burden to demonstrate that it has an interest within the meaning of Federal Rule of Civil Procedure 24.

B. Adequate Representation

Even assuming the Court were required to protect BFP's attorney lien, BFP's bare allegation that Defendants' counsel has sought legal and financial assistance, is insufficient to support its motion to intervene. While BFP and Defendants have differing motives for recovering damages from Plaintiffs, their interest in Defendants' success is joined at the hip. Where the proposed intervenor seeks the same outcome as a party, adequate representation is presumed. Washington Electric, 922 F.2d 92 at 98. BFP has shown no "adversity of interest, collusion, or nonfeasance" on the part of Defendants sufficient to overcome the presumption of adequate representation. Conservation Law Foundation of New England, Inc. v. Mosbacher, 966 F.2d 39, 44 (1st Cir. 1992). On this record, the Court finds nothing to suggest that Defendants' counsel has been or will be less than

diligent in litigating this case.[1]

C. Timeliness

Even if BFP could demonstrate that its interest is protected by Fed. R. Civ. P. 24 and that current representation is inadequate, intervention would still be barred as untimely. See United States v. Pitney Bowes, Inc., 25 F.3d 66, 70 (2d Cir. 1994). BFP has known of its interest in this action since 1995 (when it was granted a lien) and should have known, at the least, in "late 1998" (when Defendants' counsel first sought legal and financial assistance from BFP), that its interests might not be adequately represented. Now at this eleventh hour, with final submissions from the parties due imminently, BFP's motion to intervene is not only inappropriate but at least one year, if not four years, overdue. See Pitney Bowes, 25 F.3d 66 at 71.

To require Plaintiffs, and the Court, to respond to what would amount to two sets of Defendants' papers is unreasonably burdensome, where, as here, the identity of interest is one and the same.

Further, BFP has demonstrated no prejudice that would result from denial of its motion to intervene. Absent intervention, BFP would effectively be required to work cooperatively with Defendants' counsel if it chose to maintain involvement in this action. Such assistance is apparently welcomed by Defendants' counsel, notwithstanding recent conflicts. See Tr. 35-36 (Defendants' Counsel Mr. Manuel: "We were working well together .

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[1] If, as BFP asserts and Defendants' counsel disputes, Defendant, and thus Defendants' counsel, have "neither the resources nor the ability to see this litigation through to the end," BFP Mem. Law at 8, then the onus is upon Defendants to select new counsel or secure further funding. It is not for this Court to force Defendants' hand or welcome back counsel discharged by the Defendants for whatever reason.

. . If Butler, Fitzgerald & Potter would like to have input, we have no objection whatsoever . . . [W]e haven't rejected one bit of [assistance]."). Finally, unusual circumstances support denial of this motion. The party submissions and oral argument support an inference that this motion is the result of nothing more than attorney infighting. Occasional clashes and strategy disagreements, while unsurprising, are not grounds for intervention. See United States v. Yonkers Bd. of Educ., 902 F.2d 213, 218 (2d Cir. 1990) ("If disagreement with an actual party over trial strategy . . . were sufficient basis for a proposed intervenor to claim that its interest were not adequately represented, the requirement would be rendered meaningless."). Accordingly, the Court declines to extend Rule 24 to encompass this trip into Never-Never-Land. For the reasons stated above, BFP's motion to intervene as of right, and alternatively, permissively, are hereby DENIED.

The Court stayed submissions of objections to the Special Master's Report pending the outcome of this motion. The parties shall file objections, if any, on or before January 17, 2000.

SO ORDERED.

DATED: New York, New York
December 22, 1999

DEBORAH A. BATTS
United States District Judge